EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

IN THE

SUPREME COURT OF THE UNITED STATES

No. , Misc., October Term, 1984

MAJOR CRANE, JR.,

Petitioner,

V.

COMMONWEALTH OF KENTUCKY,

Respondent.

85-5238

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

J. DAVID NIEHAUS
DEPUTY APPELLATE DEFENDER OF THE
JEFFERSON DISTRICT PUBLIC DEFENDER
200 CIVIC PLAZA
719 WEST JEFFERSON STREET
LOUISVILLE, KENTUCKY 40202
(502) 587-3800
COUNSEL FOR PETITIONER

FRANK W. HEFT, JR.
CHIEF APPELLATE DEFENDER OF THE
JEFFERSON DISTRICT PUBLIC DEFENDER
CO-COUNSEL FOR PETITIONER

DANIEL T. GOYETTE
JEFFERSON DISTRICT PUBLIC DEFENDER
OF COUNSEL

CERTIFICATE

I hereby certify that a copy of this Petition was served by depositing same in a United States Postal Service Mailbox, with first-class postage prepaid and addressed to Mr. John Gillig, Assistant Attorney General of Kentucky, Capitol Building, Frankfort, Kentucky 40601, Counsel for Respondent, on August 12, 1985.

J. DAVID NIEHAUS
COUNSEL FOR PETITIONER

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

The Petitioner, Major Crane, Jr., prays that a Writ of Certiorari be issued to review the decision of the Supreme Court of Kentucky in his case.

QUESTION PRESENTED

IN A CRIMINAL CASE, DOES A STATE TRIAL COURT DENY A DEFENDANT HIS DUE PROCESS RIGHT TO PRESENT A DEFENSE AND HIS RIGHT TO CONFRONT THE WITNESSES AGAINST HIM WHEN IT REFUSES TO PERMIT HIM TO PRESENT TO THE JURY THE FACTS RELATING TO THE BELIEVABILITY OF HIS CONFESSION AND THE WEIGHT TO BE GIVEN IT WHEN THOSE SAME FACTS HAVE BEEN CONSIDERED AND DETERMINED CONCLUSIVELY BY THE TRIAL JUDGE IN HIS PRE-TRIAL DETERMINATION OF THE ADMISSIBILITY OF THE CONFESSION.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OPINIONS BELOW

No written opinion was rendered by the Jefferson County, Kentucky, Circuit Court. Following a jury trial, Petitioner was convicted of wanton murder [Ky. Rev. Stat. 507.020], and was sentenced to 40 years imprisonment by judgment dated January 5, 1984. (TR, 178-180) (Appendix, p. 15).

By Opinion rendered on February 28, 1985, the Supreme Court of Kentucky affirmed Petitioner's conviction. (Appendix, p. 1). Timely Petition for Rehearing was denied on June 13, 1985. (Appendix, p. 14). The Opinion of the Supreme Court of Kentucky, styled Major Crane v. Commonwealth of Kentucky is found at 690 S.W.2d 753 (1985).

JURISDICTION

This case is presented to the Court pursuant to 28 U.S.C. §1257(3) for denial of Petitioner's rights arising under the Constitution. The Petition for Rehearing in the Supreme Court of Kentucky was denied on June 13, 1985, ending the proceedings in that Court. This Petition is, therefore, timely filed pursuant to Sup.Ct.R. 20.4.

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT 14

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case arose from a suspected hold-up that occurred in a liquor store on August 7, 1981. The clerk, Randall Todd, was found shot in the head and subsequently he died from the wound. Investigating officers developed no leads on the case until August 14, 1981, when Petitioner, who had been arrested for a burglary of a tire store, suddenly confessed to shooting the clerk. (Supp., 7; 10).[1] Crane had been transported to a Louisville City Police District substation for processing after arrest on the burglary charge. While the police officer was typing an arrest record slip, Crane "just out of the clear blue sky" said "I confess." (Supp., p. 10). On further inquiry by the police officer, Crane confessed to robbing a hardware store. Officer Burbrink "...just looked at him and I really didn't pay him too much mind." (Supp., 10). Crane then confessed to shooting a police officer and robbing some people at a bowling alley. This apparently interested Officer Burbrink because he had his superiors contact the Jefferson County Police to investigate the leads provided by Crane's information. (Supp., 10-11). Burbrink continued to talk to Crane to develop more of the particulars of each crime. However, Crane denied knowledge of the liquor store robbery in which Randall Todd had been killed. (Supp. 11). Petitioner had not committed any of the crimes to which he confessed. (Supp., 14, 19).

In compliance with Kentucky law, Petitioner was taken to juvenile detention center. At the center, Petitioner told police about the hardware store robbery. According to Burbrink, Peititioner said

> ...'The guy hit a buzzer and an alarm went off and I shot up in the air' At that time, I said, 'Well, there was nobody shot at Brown Hardware.' He said, 'No, I am talking about Keg Liquors.' He said, 'That is where I am talking about is at Keg Liquors where that guy got killed. (Supp., 14).

The police then began questioning Crane in earnest, and, of course, the statement obtained was used at the trial of this case.

---

1. The testimony of the police officer describing this confession is set out in the Appendix to this Petition at pages 18-29.

The story told in the statement was that Major and another boy saw a robbery take place at the Algonquin Manor Shopping Center. Petitioner decided to go home and get his guns, a sawed-off shotgun and a .357 caliber pistol so he could commit a robbery too. (TE, II, 15-16). On the way, he ran into his uncle, George Howard Williams, who had recently lost his job and who needed money. Together, they planned a robbery in which Williams would pretend to buy something, and then Crane would run in and announce a hold-up (TE, II, 16). This plan was followed, but the clerk looked like he had set off an alarm and then "sirens and stuff started going off and I shot up in the air." (TE, II, 16). Major Crane claimed that he got about $300-400 from the robbery of the liquor store (TE, II, 16).

This story varied in several respects from the facts found out by police in their investigation. The robbery occurred at 10:30-10:40 p.m. on August 7. An investigation showed that no money was taken and that the bullet that killed Todd was a .32 caliber instead of a .357 caliber. (TE, II, 31-33). There was no alarm or buzzer system in the liquor store (TE, II, 35). As to the bullet size, Detectives Burbrink and Branham stated that Crane had corrected himself after the taped interview was concluded. (TE, II, 45, 30).

Based on Petitioner's statement, the police also arrested George Howard Williams. He was interviewed and gave a tape-recorded statement which tape was played at trial. Williams denied any wrong-doing, but stated that Crane came into the liquor store armed with a pistol and told the clerk it was a hold-up. As the man turned away Major fired. (TE, IV, 10). Williams fled the store without taking his purchase. Petitioner got into the car Williams was driving and they left the scene. According to Williams, Major was 16 at the time. The pistol he used was a .32 caliber revolver. (TE, IV, 11).

The last out-of-court statement taken was that of Geraldine Crane, Major's mother. She spoke to a Louisville police detective the day after Major was arrested. This statement was recorded by the detective and read by him at trial. Ms. Crane said that Major had told her that he shot a man but that he didn't know the man had died until that day he was arrested. (TE, IV, 62).

These statements were used at trial because Petitioner did not testify and both Williams and Geraldine Crane denied knowing anything about the robbery or Major Crane's part in it. (TE, III, 15; 43; IV, 55). There were no disinterested eyewitnesses to the shooting at Keg Liquors so the statements constituted the only direct evidence linking Petitioner with the crime.[2] The evidence of the statements was introduced through the police officers who had taken them. The remaining witnesses established the cause of death and described the layout of the liquor store.

Petitioner moved to suppress the oral statement (TR, 36), and received a hearing before the trial commenced. The trial court overruled and pursuant to R.Cr. 9.78, entered its findings and conclusions in the record of the case. The judge found that the delay in taking Crane to the detention center was not inordinate and that Petitioner was sufficiently intelligent and mature to appreciate what he was doing. (Supp., 73-75). The trial court rejected the claim of threats or coercion as well as the suggestion that the police officers had coached Petitioner as to what to say (Supp., 75).

In his opening statement at trial, counsel for Petitioner advised the jury that the incredibility of Crane's recorded statement could be shown through internal inconsistencies and through the circumstances under which the statement was given. (TE, I, 16). The prosecutor made no objection at this time. However, before the [illegible] of evidence the next day, Respondent's trial counsel moved in limine to prevent Crane from producing any evidence concerning the circumstances under which the statement was given. (TE, II, 3). The trial court sustained the motion on the ground that the voluntariness had been settled and that pursuant to R.Cr. 9.78 no further inquiry was permissible. (TE, II, 6-7) (App. p. 30-35).

As noted above, the statements of Major Crane, Williams and Geraldine Crane were put into evidence. In his own defense, Petitioner produced two witnesses who noticed a blond, white male

---

2. A Patrick Holder was called to testify about what Major Crane had told him concerning the robbery. However, he didn't know when Crane had spoken to him and the exact incident spoken of. (TE, II, 59-60).

leaving the vicinity of Keg Liquors at about the time the police were arriving to investigate the shooting. (TE, V, 3-5; 9-11).

The jury found Crane guilty of wanton murder (Ky.Rev.Stat. 507.020) and recommended 40 years imprisonment. (TR, 129; TE, VI, 56).

A motion for new trial was filed by Petitioner in which he maintained that under Lego v. Twomey, 404 U.S. 477 (1972), the right of the defendant to introduce evidence concerning the believability of a confession remained unchanged by the requirement to have a hearing on its admissibility. (TR, 157; 162) (App. 37). Petitioner also cited cases from a number of jurisdictions following the "orthodox" rule showing that evidence pertaining to voluntariness should also be admitted when it bore on the truthfulness of the confession. (TR, 165-166; App. 46). The motion for new trial was overruled.

On direct appeal to the Supreme Court of Kentucky, Petitioner raised as his sole ground of error the refusal of the trial judge to allow his attorneys to adduce evidence of the circumstances under which his confession was taken to attack the believability of the statement. The refusal of the trial judge to permit cross-examination, it was argued, denied Petitioner the Sixth Amendment right to confront the witnesses against him and also denied due process of law by denying him the opportunity to conduct his defense. Petitioner relied on the balancing test of Chambers v. Mississippi, 410 U.S. 284 (1973). After oral argument, the Supreme Court of Kentucky rendered an Opinion which affirmed the conviction. The decision of that Court was based on its determination that the excluded testimony related only to the voluntariness of the confession and that, in any case, it is too dangerous to put evidence of the type involved here before the jury because the jury may misuse it. [Crane v. Commonwealth, Ky., 690 S.W.2d 753, 755 (1985)] (Appendix, p. 5). By timely Petition for Rehearing, Crane showed the legitimate purpose of the evidence sought to be admitted and also pointed out that the dangers envisioned by the Supreme Court of Kentucky were inconsequential and contrary to universally held principles of evidence law.

Petitioner again argued that the state evidentiary grounds of the Kentucky Court's Opinion were insufficient to satisfy the balancing test set out in Chambers v. Mississippi, 410 U.S. 284 (1973). The Petition for Rehearing was denied in the Supreme Court of Kentucky on June 13, 1985. Major Crane now seeks relief in this Court.

REASONS FOR REVIEW

This case involves a question that was touched on in Jackson v. Denno, 378 U.S. 368 (1964), and Lego v. Twomey, 404 U.S. 477, 485 (1972), but has never really been resolved. In Lego v.Twomey the Court wrote

> The procedure we established in Jackson was designed to safeguard the right of an individual, entirely apart from his guilt or innocence, not to be compelled to condemn himself by his own utterances. Nothing in Jackson questioned the province or capacity of juries to assess the truthfulness of confessions. Nothing in that opinion took from the jury any evidence relating to the accuracy or weight of confessions admitted into evidence. A defendant has been as free since Jackson as he was before to familiarize a jury with circumstances that attend the taking of his confession, including facts bearing upon its weight and voluntariness.

The question that arises from this language is found in the last sentence of the excerpt set out above. The question is whether denial of the opportunity to familiarize the jury with the facts concerning the taking of a confession is solely a matter of state evidentiary law or whether such denial must satisfy the due process of law provision of the Fourteenth Amendment of the Constitution and the confrontation provision of the Sixth Amendment. It is important to note that the quoted language from Lego v. Twomey does not require any court to allow introduction of evidence of the taking of the confession but merely states that the defendant is as free to do so after Jackson as he was before. This imprecise language has now given rise to an application of state law that denies Petitioner a right to make a defense to the charge that was laid against him. As shown in the statement of the case, the Supreme Court of Kentucky has interpreted R.Cr. 9.78, its codified rule mandating a Jackson v. Denno hearing,[3]

3. Crane v. Commonwealth, 590 S.W.2d 753 (Ky., 1985) at page 754.

to prohibit the introduction of evidence concerning the circumstances under which the confession was obtained once the issue of admissibility has been settled in favor of admission. The Supreme Court of Kentucky took the language excerpted from Lego v. Twomey to mean that "[t]he several states are left to their own procedure so long as adequate safeguards are prescribed." [Crane v. Commonwealth, 690 S.W.2d 753, 754 (Ky., 1985)]. It acknowledged Kentucky's adherence to the Wigmore or "orthodox" rule which determines the admissibility of a confession by submitting that question to the trial judge. Once the initial determination is made, according to the Kentucky Court, "in some cases, the jury is permitted to hear the same evidence, usually without the testimony of the defendant, but advised they cannot consider voluntariness but may consider only that evidence which relates to credibility." [Crane v. Commonwealth, 690 S.W.2d at 754]. The Kentucky Court applied the rule to the facts of Petitioner's case first by holding that the excluded testimony dealt solely with voluntariness and then by listing three dangers that it foresaw in allowing the jury to hear evidence about the circumstances under which the confession was obtained. [690 S.W.2d at 755] (App., 5). Obviously, the Kentucky Supreme Court saw no impediment to its particular interpretation of Lego v. Twomey.

However, Petitioner had argued on appeal that he had a due process right to conduct a fair defense and, more specifically, to cross examine police officers who testified about the confession to show that his confession was untrue and unworthy of belief. This argument was premised on the principles announced by the Court in Chambers v. Mississippi, 410 U.S. 284 (1973), to the effect that due process of law (and the Sixth Amendment) require a fair opportunity to defend against the accusation and to cross-examine witnesses. [410 U.S. at 294]. Under the rule of Chambers the right to defend and to cross-examine may be curtailed but only when close examination of the case shows that a legitimate interest of the state requires curtailment. [410 U.S. at 295]. This rule should be incorporated explicitly into the language of Lego v. Twomey to avoid situations in

which a state court impinges on the right to defend and to cross-examine solely as a matter of evidentiary law.

The present case shows the need for an explicit statement of the law. Here the main evidence against Petitioner was his own confession which was introduced through the testimony of a police officer. (TE II, 14-30). Although Petitioner was allowed to show the discrepancies between his story and the facts determined by the police investigation, he was not allowed to show facts that would have shown the likelihood that he would make things up. The tendency of suspects of crime to confess falsely or to confess to crimes about which they know but which they have not committed is well-documented. [1984 Wisconsin Law Review, Note: "Corroborating False Confessions: An Empirical Analysis of Legal Safeguards Against False Confessions," p. 1121 (1984)]. It is, therefore, not unreasonable to submit as much factual information as possible to the jury to allow it to determine if the defendant spoke truthfully at the time of his confession or if, for other purposes, he spoke falsely. It is for the jury to decide whether to believe the out-of-court statement. Typically, the out-of-court statement is introduced by the police officer who secured it. Obviously, the defendant must demonstrate the lack of credibility of the statement (at least in part) by cross- examining the officer. This is what Petitioner sought to do. On avowal he elicited testimony that he had been interrogated for close to two hours by four or five police officers in a small (10' X 12') windowless room without the presence of a lawyer or a family member. (TE V, 15-25). Clearly, such testimony would bear on the voluntariness of the resulting statement but it would also provide the basis of an argument that the story was made up to impress the police. As such, this evidence was clearly relevant to the issue of whether the jury should believe the out-of-court statement. Because it was relevant, the evidence should have been admitted unless there was a legitimate reason to prevent admission.

The Supreme Court of Kentucky set out three reasons why the evidence should not be admitted.

> The dangers inherent in admitting evidence before the jury concerning the circumstances attendant to taking the confession are obvious. We have previously spoken of the difficulty in separation of those factors relating to volun-

> tariness and those relating to credibility, and feel this separation is best vested in the hands of the trial judge and not in the minds of the jurors. Second, the issue of voluntariness is a settled issue, no longer debatable except on appeal. Third, the evidence offered is usually selective when the defendant fails to take the stand, so his previous experiences with the law, his knowledge of interrogating procedures, his familiarity with Miranda rights, etc. are excluded. [Crane v. Commonwealth, 590 S.W.2d at 755].

Yet these purported dangers are insubstantial. The Kentucky Supreme Court perceived a difficulty in the jury separating the ideas of voluntariness and credibility and, therefore, determined to prevent the jury from hearing any evidence that might relate to voluntariness. But this goes against universally accepted rules of evidence.

All authorities on evidence law agree that relevant evidence must be admitted to the hearing of the jury unless the danger of unfair prejudice, confusion of issues or waste of the court's time substantially outweighs the probative value of the evidence. [Federal Rules of Evidence, Rule 403, cited in I Weinstein, Federal Rules of Evidence, §403, p. 403-1; McCormick, Hornbook on Evidence Law, 2 Ed., §185, p. 438-441 (1972); I WIGMORE, Evidence, §10a, p. 674 et. seq. (Tiller's Revision, 1983)]. However, the prejudice spoken of in this rule is not merely evidence that damages the chance of success for one party or the other.

> It should be emphasized that prejudice, in this context, means more than simply damage to the opponent's cause. A party's case is always damaged by evidence that the facts are contrary to his contentions; but that cannot be ground for exclusion. What is meant here is an undue tendency to move the tribunal to decide on an improper basis, commonly, though not always, an emotional one. [McCormick, §185, p. 439, n. 31].

Where prejudice cannot be shown, or the prejudice does not substantially outweigh the probative value of the evidence, there is no cause to exclude. The rule of multiple admissibility is an offshoot of the general rule stated above. Where a piece of evidence is admissible for a legitimate evidentiary purpose, the fact that it may prejudice an adversary and may run afoul of some other rule of exclusion will not prevent its admission, unless the prejudice, as that term is defined above, substantially outweighs the probative value. [I WIGMORE, §13, p. 693-694; 701 (Tiller's Revision, 1983)]. As Wigmore's Treatise puts it, "[t]his doctrine, though involving

certain risks, is indispensible as a practical rule." [I WIGMORE, at 694]. "It is uniformly conceded that the instruction of the court suffices" to avoid the risk of misuse of the evidence by the jury. [I WIGMORE, p. 697]. And finally, even though exclusion of evidence is proper in some cases, the "exclusion of relevant evidence for undue prejudice (viz., because of the danger of jury 'misdecision') is a drastic remedy and [the] trial courts should always explore the possibility that the less drastic remedy of a limiting instruction may be sufficient to minimize the danger of jury misdecision to an acceptable level." [I WIGMORE, p. 701-702].

Kentucky has never deviated from acceptance of the principles set out above until this case. The earliest statement of the rule of multiple admissibility is found in Cassidy v. Berkovitz, 169 Ky. 785, 185 S.W. 129 (1916). The rule has been applied primarily in situations involving evidence of former crimes. In Gall v. Commonwealth, Ky., 607 S.W.2d 97, 106 (1980), it was stated:

> It is a settled principle that competent, relevant testimony will not be excluded on the mere ground that it reveals, to the defendant's obvious prejudice, an unrelated crime or crimes.

Kentucky law adheres to the notion of admission of evidence for a limited purpose. It has always been held that an admonition will cause a jury to consider evidence only for the purpose for which it was admitted. In Commonwealth v. Richardson, Ky., 674 S.W.2d 515 (1984), the Supreme Court of Kentucky upheld a procedure in which the trial court is to admonish the jury to limit the effect of a prior felony conviction to witness credibility only despite a previous holding in Cowan v. Commonwealth, Ky., 407 S.W.2d 695, 698 (1966), that "no admonition can really assuage the prejudice that is done to a defendant on the merits of his case by disclosure of past felonies in the name of impugning his credibility..." The belief of the courts in the sophistication and tractability of juries is apparent from the general acceptance of the principle that admonitions will channel potentially prejudicial evidence to the right use.

The Supreme Court of Kentucky cited Lego v. Twomey, 404 U.S. 477 (1972), for the proposition that it is difficult to separate the factors dealing with voluntariness and with credibility. It may first be observed that the overlap is unimportant unless there is a

very substantial chance of prejudice to the prosecutor. Prejudice in this context of course means a substantial chance that the jury would be led to decide on factors other than the evidence presented. In the present case, this would be quite unlikely. The excluded evidence was to be adduced to show how a 16-year old boy might have prevaricated about a robbery and shooting that he had heard about. If there was the possibility of misuse of this evidence, the trial court could have admonished the jury. The jury is deemed amenable to admonition and is presumed capable of setting aside its emotions to achieve a just result.

The fact that the issue of voluntariness is concluded by the trial court's pre-trial findings does not support a rule that would keep relevant information from the jury. The trial court may admonish the jury as to proper use. There is no reason to suppose that the jury would ignore this type of admonition any more than it would any other admonition. Modern trial practice is built on the idea of admissibility for limited purpose. [I WIGMORE, §13, p. 695, note 1, 2nd column]. In the absence of good reason to suspect that the jury would disregard an admonition, this danger seems remote.

The last danger posed by the Court seems more pertinent to the question of voluntariness than to the credibility of the confession. Familiarity with Miranda rights and police interrogation procedures, etc., are matters that are raised when trying to determine whether to admit the confession. In the present case, these matters would have been irrelevant. The point to be made was that Major Crane was making up a story to impress the police, or at least, that he was making up a story. None of the factors mentioned in the Opinion would be relevant to this question. Therefore, the perceived danger does not exist in this case. The perceived danger is very unlikely to happen in any case. If, by cross-examination of a police officer a defendant would create the inference that he was inexperienced in the criminal justice system, a competent prosecutor could by redirect examination or introduction of another witness rebut this inference. The perceived danger is non-existent.

The reasons given by the Supreme Court of Kentucky are contrary to the accepted rules of evidentiary law. These reasons are

not the legitimate state interests spoken about in Chambers v. Mississippi [410 U.S. at 295]. There was no good reason to foreclose Petitioner's cross-examination as to the circumstances surrounding the obtaining of his confession. As noted in the dissent to Crane, the Opinion of the majority is a clear departure from the "orthodox" rule. Citing State v. Orscanin, 266 N.W.2d 880 (Minn., 1978), Justice Leibson noted that under the rule, if the confession is admitted, both it and the evidence surrounding the making of it are presented to the jury for consideration only as to weight and credibility. [Crane, 690 S.W.2d at 757]. This is the accepted practice under the orthodox rule [III WIGMORE, Evidence, §861, p. 580 (Chadbourne Revision, 1970); 21 University of Chicago Law Review, "Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury," 317, 320 (1954); I LaFave & Israel, Criminal Procedure, §10.5 "Suppression Hearing" 799-800 (1984)]. The Surpeme Court of Kentucky had gone beyond the initial determination of admissibility and has taken from the jury the determination of weight and credibility. [Crane v. Commonwealth, 690 S.W.2d at 757, dissent of Leibson, J.]. This departure has occurred because there is no definitive statement of the limit to which a state might go in allocating between the judge and jury the determination of admissibility and the determination of credibility and weight. Neither Jackson v. Denno nor Lego v. Twomey prohibit a state from denying a criminal defendant the opportunity to present to the jury evidence that clearly bears on whether the jury should believe the confession to be true. However, the defendant in a criminal case has a due process right to a fair chance to defend himself. The only way to secure the right in the circumstances presented here is to make an explicit holding that in confession cases the defendant may introduce any evidence relevant to weight and credibility, even if that evidence also bears on voluntariness. The only Court that can make this ruling is this Court. Therefore, the Court is urged to grant the writ prayed for.

Respectfully submitted,

J. DAVID NIEHAUS
DEPUTY APPELLATE DEFENDER OF THE
JEFFERSON DISTRICT PUBLIC DEFENDER
200 CIVIC PLAZA
719 WEST JEFFERSON STREET
LOUISVILLE, KENTUCKY 40202
(502) 587-3800
COUNSEL FOR PETITIONER

FRANK W. HEFT, JR.
CHIEF APPELLATE DEFENDER OF THE
JEFFERSON DISTRICT PUBLIC DEFENDER
CO-COUNSEL FOR PETITIONER

DANIEL T. GOYETTE
JEFFERSON DISTRICT PUBLIC DEFENDER
OF COUNSEL

RENDERED: February 28, 1985
TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JOSEPH ECKERT, JUDGE
No. 82-CR-1544

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION OF THE COURT BY JUSTICE GANT

AFFIRMING

Appellant was convicted of wanton murder of the clerk of a liquor store during a robbery, and sentenced to 40 years imprisonment. The single issue on this appeal concerns a confession by the appellant, and poses a question of first impression.

Prior to trial, appellant moved to suppress his confession pursuant to RCr 9.78, which reads:

> **Rule 9.78. Confessions and searches--Suppression of evidence.**--If at any time before trial a defendant moves to suppress, or during trial makes timely objection to the admission of evidence consisting of (a) a confession or other incriminating statements alleged to have been made by him to police authorities or (b) the fruits of a search, the trial court shall conduct an evidentiary hearing outside the presence of the jury and at the conclusion thereof shall enter into the record findings resolving the essential issues of fact raised by the motion or objection and necessary to support the ruling. If supported by substantial evidence the factual findings of the trial court shall be conclusive.

The trial judge conducted a lengthy hearing and denied the motion to suppress, finding the confession to be voluntary. He made extensive findings of fact and conclusions of law covering the hearing and the contentions of the appellant that: There was no coercion or sweating; there was no overreaching by the interrogating officers; there was no inordinate or undue delay; the detention was normal and not under repressive circumstances; despite his youth, appellant had numerous exposures to the authorities and was "street wise"; and appellant was fully informed of and understood his rights.

At trial, appellant did not testify, but sought to introduce through the interrogating officers, before the jury, the same evidence of the circumstances surrounding the taking of the confession, which evidence was denied upon motion by the Commonwealth.

It is important to note the request of the appellant and the ruling of the court. By avowal testimony and argument to this court, appellant designates that his intention was to elicit such information as the length of time appellant was detained, the size of the room in which he was questioned, the number of officers present, the absence of a member of his family or a social worker, etc. The effect of the ruling of the trial court was that this evidence related solely to voluntariness and would not be admitted. However, the trial court specifically ruled that counsel for appellant could develop any evidence from any source, including the interrogating officers, relating to "credibility and inconsistencies." It is also noteworthy that appellant concedes that he was allowed to fully develop the "inconsistencies and mistakes of fact"

in the confession. However, he contends that, although under our law the jury is not permitted to pass upon the voluntariness issue, the circumstances under which the confession was given should be admitted in order to reflect upon credibility.

The roots of this case are firmly implanted in Lego v. Twomey, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972), and Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). These cases, in essence, provide that an accused must be permitted to attack the admissibility of evidence such as a confession or the fruits of a search before that evidence is introduced at trial. The several states are left to their own procedure as long as adequate safeguards are prescribed. Two general categories have evolved through the years which are approved by these two cases. One of these has been designated as the "orthodox" rule, under which Kentucky has cast its lot with the enactment of RCr 9.78. The orthodox rule provides that the trial judge alone shall determine the voluntariness of a confession or the admissibility of the fruits of a search.[1] The other rule is known as the Massachusetts or federal rule, under which the judge makes the original determination of voluntariness and, if the evidence is admitted, the circumstances

---

[1]Cf. Diehl v. Commonwealth, Ky., 673 S.W.2d 711 (1984), in which this court held there was no error in excluding testimony before the jury concerning the voluntariness of a consent to search where the judge had ruled, upon substantial evidence, that the consent was voluntary. In this case we ruled that the findings of the judge were conclusive as to the issue raised.

of the confession (or consent to search) are placed in evidence with the advice that the jury may consider the evidence only if it finds that the confession or consent was voluntary.

Under the orthodox rule, a certain procedure has developed. The trial judge first conducts an evidentiary hearing on voluntariness, but is admonished by the United States Supreme Court that the judge cannot consider the reliability, credibility or authenticity of the confession in determining its voluntariness. See Lego v. Twomey, supra, at 404 U.S. 484, 92 S. Ct. 624, Footnote 12. Then, in some cases, the jury is permitted to hear the same evidence, usually without testimony of the defendant, but advised they cannot consider voluntariness but may consider only that evidence which relates to credibility. The Supreme Court acknowledges that these separations are difficult.

The history of these suppression hearings in Kentucky is likewise of importance. Following Jackson v. Denno, supra, this court decided the case of Bradley v. Commonwealth, Ky., 439 S.W. 2d 61 (1969). See also Britt v. Commonwealth, Ky., 512 S.W.2d 496 (1974). This court adopted RCr 9.78, effective January 1, 1978, subsequent to our decision in Bradley, supra, and clearly modifies the procedural requirements announced in that case.

It is the opinion of this court that there was no error in excluding from the jury the circumstances relating

solely to voluntariness. As we said in Diehl v. Commonwealth, supra, the findings of the trial court were conclusive on that issue. In this case, appellant was permitted to show, upon examination of an interrogating officer, that the confession contained a misdescription of the weapon used in the homicide; that it spoke of a burglar alarm when there was none; that it told of taking money from a cash drawer when none was taken, and spoke of a gun being fired which had not been fired. Appellant was permitted to question the officer about suggesting material to the appellant during a break in the taping process. It is our further opinion that the excluded testimony related solely to voluntariness. It did not relate to the credibility of the confession, but to the credibility of the trial judge and his ruling on voluntariness, the latter being the function of the appellate court, not the jury.

The dangers inherent in admitting evidence before the jury concerning the circumstances attendant to taking the confession are obvious. We have previously spoken of the difficulty in separation of those factors relating to voluntariness and those relating to credibility, and feel this separation is best vested in the hands of the trial judge and not in the minds of the jurors. Second, the issue of voluntariness is a settled issue, no longer debatable except on appeal. Third, the evidence offered is usually selective when the defendant fails to take the stand, so his previous experiences with the law, his knowl-

edge of interrogating procedures, his familiarity with Miranda rights, etc. are excluded.

It is the holding of this court that, once a hearing is conducted pursuant to RCr 9.78 and a finding is made by the judge based upon substantial evidence that the confession was voluntary, that finding is conclusive and the trial court may exclude evidence relating to voluntariness from consideration by the jury when that evidence has little or no relationship to any other issue. This shall not preclude the defendant from introduction of any competent evidence relating to authenticity, reliability or credibility of the confession.

The judgment is affirmed.

All concur except Leibson, J., who dissents and files a dissenting opinion, and Stephenson, J., who did not sit.

COUNSEL FOR APPELLANT:

Frank W. Heft, Jr.
Chief Appellate Defender of the
Jefferson District Public Defender
200 Civic Plaza
719 West Jefferson Street
Louisville, KY 40202

J. David Niehaus
Deputy Appellate Defender

OF COUNSEL:

Daniel T. Goyette
Deputy Appellate Defender

COUNSEL FOR APPELLEE:

David L. Armstrong
Attorney General
Capitol Building
Frankfort, KY 40601

John S. Gillig
Assistant Attorney General

RENDERED: February 28, 1985
TO BE PUBLISHED

Supreme Court of Kentucky

84-SC-407-MR

MAJOR CRANE — APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HON. JOSEPH ECKERT, JUDGE
(Indictment No. 82-CR-1544)

COMMONWEALTH OF KENTUCKY — APPELLEE

DISSENTING OPINION BY JUSTICE LEIBSON

Respectfully, I dissent. There is no articulable distinction between evidence relative to voluntariness and evidence relevant to credibility. Evidence that a confession was coerced, of physical or psychological intimidation surrounding the taking of the confession, is relevant to its credibility. It bears on its truthfulness.

The fact that the trial judge has already considered the same evidence in making a decision whether to admit or exclude the confession makes no difference. Neither does the fact that under RCr 9.78 it is solely the function of the judge to decide whether to admit the confession.

The jury must still decide guilt. The same evidence that the judge heard in deciding to admit the confession must now be heard a second time before the jury, because the evidence bears on the credibility of the confession, an essential consideration in deciding guilt. The judge's decision about coercion does not

preempt the jury's need to consider evidence about coercion in deciding guilt.

The fundamental principle which we should apply has been summarized in Lawson, Kentucky Evidence Law Handbook, § 1.10(A) (2nd ed. 1984), as follows:

> "Multiple Purposes: Evidence that would be admissible if used by the jury for one purpose but inadmissible if used for another purpose should be admitted when offered for the proper purpose."

The trial judge's decision that the confession was not involuntary, or that he rejects the evidence of coercion, has no bearing on its subsequent use before the jury as relevant to the credibility of the confession.

RCr 9.78 was enacted to bring our procedure in compliance with United States Supreme Court decisions in Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964) and its progeny, which includes Lego v. Twomey, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972).

Jackson in 1964 mandated a pretrial hearing procedure at which the trial judge must decide on the admissibility of a confession when challenged as involuntary. Only then will the jury be permitted to consider it. Following Jackson there was confusion as to whether Jackson eliminated any further need for the jury to consider voluntariness as a threshold before considering the confession. But this threshold question has no bearing on the relevance of such evidence to the credibility issue.

During the period while there was confusion about the meaning

of Jackson, we adopted the Bradley rule. Bradley v. Commonwealth, Ky., 439 S.W.2d 61 (1969). This rule gave the accused a second bite at the threshold issue as whether the confession should be entirely disregarded. We stated that even though the trial judge has decided the evidence was admissible:

> "[T]he trial court should admonish the jury not to consider the evidence unless it finds beyond a reasonable doubt that the defendant freely and voluntarily consented . . . ."
> 439 S.W.2d at 64.

The effect of RCr 9.78, effective January 1, 1978, is to eliminate the Bradley procedure, the jury's second bite at the suppression issue. But the 1978 change did not, and could not, restrict the admissibility of evidence regarding the circumstances surrounding the taking of a confession. Once the confession has been admitted into evidence, this evidence is relevant to the weight and credibility of that confession. Our holding to the contrary is not just a matter of misinterpreting RCr 9.78. It is a constitutionally impermissible interference with the accused's right to challenge the credibility of the evidence against him.

Lego v. Twomey, supra, serves to clarify the confusion which followed Jackson v. Denno. It explains that the rule in Jackson does not limit the defendant's right to present the same evidence which the judge has considered and rejected at the time he decided voluntariness when ruling on the admissibility of the confession. Such evidence may be offered once more before the jury, so that the jury may now weigh this same evidence in considering the credibility of the confession, even though the confession has been admitted into evidence. Lego states:

> "A defendant has been as free since Jackson as he was before to familiarize a jury with circumstances that attend the taking of his confession, including facts bearing upon its weight and voluntariness. In like measure, of course, juries have been at liberty to disregard confessions that are insufficiently corroborated or otherwise deemed unworthy of belief." 404 U.S. at 485-86.

Lego explains the reason that such evidence is admissible a second time as follows:

> "Nothing in Jackson questioned the province or capacity of juries to assess the truthfulness of confessions. Nothing in that opinion took from the jury any evidence relating to the accuracy or weight of confessions admitted into evidence." 404 U.S. at 485.

Thus Lego explains that the United States Supreme Court's purpose in Jackson in requiring a preliminary suppression hearing was to keep confessions from coming before the jury, whether true or false, if involuntarily obtained. The jury must still consider whether the confession is true, and evidence of coercion bears directly on the question. The Supreme Court states that the Jackson "case was not aimed at reducing the possibility of convicting innocent men." Lego, supra at 485. As restated in the headnote to Lego v. Twomey:

> "4. The rule excluding coerced confessions from evidence does not preclude an accused, once his confession is admitted in evidence, from familiarizing the jury with the circumstances surrounding the confession, including facts bearing on its weight and voluntariness, and does not preclude the jury from disregarding a confession which is insufficiently corroborated or otherwise deemed unworthy of belief." 30 L.Ed.2d at 619-20.

The majority opines that there are two rules on this subject, an "orthodox" rule followed in Kentucky and a "Massachusetts or federal rule" which, presumably, is different. There may be room for two procedures; one where the trial judge alone decides on admissibility, and a second where after the trial judge decides to admit the confession, the jury is instructed to consider voluntariness a second time as a threshold before considering the confession. But either way the jury may still consider evidence of coercion as bearing on the weight to be given a confession. The only difference is that in one case there would be no separate instruction to the jury to consider voluntariness as a threshold to be crossed before giving any consideration to the confession.

In Hamilton v. Commonwealth, Ky., 580 S.W.2d 208 (1979), we state:

> "The effect of RCr 9.78 is to obviate the procedural requirement of submitting the issue of voluntariness of a confession to a jury following the determination of that issue by the trial judge. . . . [I]t follows that there was no error in [the trial court's] failure to present the issue of voluntariness to the jury." 580 S.W.2d at 210.

This case says "to present the issue of voluntariness to the jury," but nothing about presenting evidence of coercion to the jury. It means only that there is no need to instruct the jury to consider voluntariness as a threshold issue before considering the confession. This has nothing to do with the duty to admit evidence bearing on the credibility of the confession, and coercion fits squarely under that heading.

State v. Urscanin, 266 N.W.2d 880 (Minn. 1978) illustrates

the meaning of "the so-called 'orthodox rule.'" which Kentucky has adopted. It explains that the court's preliminary hearing considering voluntariness is conclusive as to "whether the confession is admissible." Id. But it further explains:

> "[I]f it is admissible, the court admits it and evidence surrounding the making of the confession. It does not invite the jury to deliberate on the issues relating to admissibility, but only on those relating to weight and credibility." 266 N.W.2d at 881. (Emphasis added.)

We have gone an impermissible step further. We not only withdraw from the jury any further consideration of admissibility, but we also withdraw any further consideration of "those [issues] relating to weight and credibility." Id.

There is an obvious distinction between the situation with regard to voluntariness of a confession and the situation with regard to consent to search. Whether the consent to search was voluntary or not is completely unrelated to the credibility of the evidence obtained in the search. Both situations are the same in that if the trial court finds that the confession was obtained as a result of coercion or the search conducted by coercion, the evidence should be suppressed. The difference is that effecting a search by coercion has no bearing on the credibility of the physical evidence obtained as a result of the search, but obtaining a confession by coercion has a direct bearing on the credibility of the confession. Diehl v. Commonwealth, Ky., 673 S.W.2d 711 (1984), cited in the majority opinion, is not dispositive of the issue before us. It is inapposite.

This case should be reversed and remanded with directions that, regardless of the trial judge's finding of fact as to the admissibility of the confession, the jury should be permitted to consider evidence of coercive circumstances surrounding its taking.